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IN THE

Supreme Court of the United States

October Term, 1967

NO. 839

STRICKLAND TRANSPORTATION CO., INC.,
Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., ET AL.,
Appellees

On Appeal From The United States District Court For The Northern District Of Texas

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) appellees Central Freight Lines Inc., Herrin Transportation Company and Roadway Express, Inc. move that the judgment of the district court be affirmed because it is manifest that the question presented is without substance and does not require further argument.

STATEMENT

This is an appeal from a judgment of a three-judge district court which dismissed appellant's action seeking to set aside an order of the Interstate Commerce

Commission in its dockets MC-C-4472, *Central Freight Lines Inc., et al. v. Strickland Transportation Co., Inc.*, and *MC-59680 (Sub-No. 117), Strickland Transportation Co., Inc., Extension—Louisiana Routes* (Appendices A, B, C, F, G and I to Jurisdictional Statement, 102 M.C.C. 291).

The opinion of Circuit Judge Goldberg for the majority of the district court, with one minor exception,[1] accurately and concisely states the nature and long history of the case (Appendix A to Jurisdictional Statement at 26-31). No purpose would be served by repeating that statement.

In the argument below appellees will mention certain errors contained in appellant's statement which adopts verbatim the statement of dissenting District Judge Hughes (Appendix C to Jurisdictional Statement at 39-47, 48). As also indicated below, appellees do not agree with appellant's analysis of what question or questions are presented.

THE QUESTION PRESENTED

When a United States district court on review has

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[1] At page 29 of Appendix A the opinion states:

> "On June 1, 1964, in Cause No. MC-C-4472, the intervening defendants *and the Commission* filed a joint complaint, embracing a petition to reopen and alternatively to reform the Sub 117 Certificate. . . ." (emphasis added)

The Commission was not a complainant-petitioner but was the forum in which appellees' complaint-petition was filed.

set aside an Interstate Commerce Commission order and resulting motor carrier certificate in part and has remanded the case to the Commission for "further consistent proceedings" and the Commission has failed in its first effort to fashion the certificate so as to limit the authorized service as particularly directed by the court, is the Commission powerless later to correct the certificate so as to enforce the court's mandate unless it can also comply with the provisions of Section 212(a) of the Interstate Commerce Act, 49 U.S.C. §312(a)?

ARGUMENT

The judgment of the district court approving the Commission's order and dismissing the action is clearly correct for the reasons stated by the opinions of the judges constituting the majority and for the reasons stated in the report of the Commission (Appendices A, B and F to Jurisdictional Statement).

The singular issue presented was recognized as such and properly answered in the negative by the court below and by the Commission. In most pertinent part the Commission pointed out[2] that the holding and mandate of the district court in *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F.Supp. 777 (S.D. Tex. 1960), *aff'd sub nom, Herrin Transportation Co. v. United States*, 366 U.S. 419 (1961),

> ". . . specifically found it to be an error of law to grant that portion of the authority

[2]Appendix F to Jurisdictional Statement at 70-71, 102 M.C.C. 291.

> sought as described in (1) and (2) of the language quoted from the court's opinion above for the reason that it was not adequately supported by the evidence and would result in a new service for which the court found no need had been established. This clearly precludes operations of the scope defendant is conducting here because they involve 'service from or through Houston destined to Beaumont (and Orange) * * *, or in the reverse direction.' No further record was made nor were there any supplementary findings which were not expressly stated in our report on further consideration to be in accordance with the opinion and mandate of the court. In the circumstances, *we are bound by the opinion of the court and any broader grant of authority made contrary thereto, however unintended, would fail to meet either its mandate or statutory requirements.*" (emphasis added)

Similarly, the court below reasoned (1) that the Commission was not powerless to correct the certificate because Strickland's "legalistically imaginative but legally unwarranted construction" had not been foreseen (particularly in view of the explicit terms of the mandate in *T.S.C.* which the Commission expressly adopted as the basis of its first re-draft) and (2) that the Commission was simply without power to act except in accord with the mandate. In short the court said:

> "By inadvertently fashioning a certificate inconsistent with the court's mandate, the Commission became bound to amend the certificate to conform to the mandate, whether it took two or two dozen later efforts to properly effectuate the court's order. Courts are not procedural pawns whose opinions can be frus-

trated through administrative misadventure."[3]

As demonstrated, for example, by the different construction of the restriction in Strickland's 1961 Sub 117 certificate made by the Commission's examiner here,[4] the "administrative misadventure" in the Commission's process of fashioning the 1961 certificate is understandable. The mistake was not so apparent as the difference between the colors black and white. The restrictive language chosen in 1961 was not as precise as it might have been, but in 1961, and now, such language was certainly subject to an interpretation that it did in fact prescribe Strickland's new through services from Beaumont and Orange "through Houston" to St. Louis, Chicago, etc., and vice versa which the court in *T.S.C.* directed the Commission not to authorize. As noted by the opinions of the court below,[5] the mistake of the Commission in its fashioning of the restrictive language in 1961 was a mere linguistic or semantic misadventure whereas its controlling, express and conscious decision and order on remand was to conform strictly to the court's mandate and to grant nothing denied by the district court at Houston.

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[3]Appendix A to Jurisdictional Statement at 33.

[4]Appendix F to Jurisdictional Statement at 65. Various Commission reports support the examiner's construction. *E.g., Transamerican Freight Lines, Inc. —Interpretation of Certificate*, 95 M.C.C. 121, 125 (Op. Rts. Rev. Bd. No. 3, 1964), *affirmed, Transamerican Freight Lines, Inc. v. United States*, 258 F.Supp. 910 (Del. 1966), 1966 F.C.C. ¶81,846.

[5]Appendix A to Jurisdictional Statement at 35; Appendix B to Jurisdictional Statement at 36, 37.

In effect appellant's arguments are twofold. First appellant contends that the Commission has no inherent power to correct certificates fashioned and issued by mistake in such form as not to conform (1) with the mandate and order of a reviewing court and (2) with the Commission's expressed intent to comply with such mandate unless the Commission's mistake in fashioning the certificate is discovered and complained of within 30 days or Section 212(a) is complied with. (Jurisdictional Statement at 3, 13-20) Secondly, and apparently in the alternative, appellant contends that if the Commission is held to have such a power to correct, still the order under review is erroneous in that there is nothing to correct because *if* the mandate of the court in *T.S.C.* were construed to prohibit only new *local* service on the involved route between Houston and Beaumont-Orange, and not to apply as well to prohibit new through service, then, in that event, the 1961 certificate did conform to the court's mandate.*

Both arguments are patently without substance.

The authorities cited by the district court establish that in those circumstances wherein through inadvertence or mistake in the process of fashioning a certificate the form of the certificate does not conform with the Commission's own decision and order, but purports to authorize new services not found to be needed and clearly beyond the Commission's expressed inten-

*The Court will note that appellant's statement as well as its argument, as those of dissenting District Judge Hughes, are made to conform to these two basic positions.

tion to grant, the Commission has the inherent authority, power and duty to correct the erroneous certificate, on its own motion or otherwise, whenever such error is found and without respect to Section 212(a) or the Commission's rules governing the filing of petitions for reconsideration. *A fortiori*, the Commission has such power of correction where, as here, the outstanding certificate is found not to conform with the decision, order and mandate of a reviewing court decreeing that on remand certain specifically described through services via Houston should not be authorized and the Commission's only expressed and conscious decision was to conform the certificate to such mandate.

Although appellant's first argument is at least "legalistically imaginative," appellant's second argument lacks even that attribute. Ostrich like, this second argument simply ignores the fact that subparagraphs "(1)" and "(2)" of the court's footnote 42 in *T.S.C.* ordered that under its Sub 117 certificate Strickland would not be permitted to engage in any transportation from Chicago, St. Louis, etc. "through" Houston to Orange, Beaumont or any intermediate points between Houston and Orange, or vice versa. *If* the words "or through" had not been used appellant's argument (Jurisdictional Statement at 21-23) would be appropriate. But those plain words *were* a part of the reviewing court's mandate, and the Commission's interpretation thereof as proscribing new through service over the Houston gateway as well as new local service (Judisdictional Statement at 68) could not be

seriously questioned even if the point were reviewable.[1]

CONCLUSION AND PRAYER

For the foregoing reasons the district court's judgment should be affirmed, and appellees so pray.

Respectfully submitted,

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[1] In its Jurisdictional Statement at 2, 5 and 21 appellant expressly recognizes that new service "through" Houston as well as new local service from Houston to points on the involved route, and vice versa, was proscribed by the district court in *T.S.C.*, and in open court below and before the Commission appellant's counsel made the same admissions stating, contrary to dissenting Commissioner Bush (Appendix F to Jurisdictional Statement at 74-75), that no factual or legal challenge was being made against the court's decree in *T.S.C.*

PROOF OF SERVICE

I, Phillip Robinson, one of the attorneys for Central Freight Lines, Inc., Herrin Transportation Company and Roadway Express, Inc., Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of December, 1967, I served copies of the foregoing Motion To Affirm on the several parties hereto as follows:

(1) On Strickland Transportation Co., Inc. by mailing copies, in duly addressed envelopes with air mail postage prepaid to Ewell H. Muse, Jr., 415 Perry-Brooks Building, Austin, Texas 78701; and Ralph W. Currie, 1011 Texas Bank Building, Dallas, Texas 75202.

(2) On the United States of America by mailing copies, in duly addressed envelopes with air mail postage prepaid to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Howard E. Shapiro, Attorney, Department of Justice, Washington, D. C. 20530; and Melvin M. Diggs, United States Attorney, United States Court House, Fort Worth, Texas.

(3) On the Interstate Commerce Commission by mailing copies, in duly addressed envelopes with air mail postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and Nahum Litt, Attorney, Inter-

state Commerce Commission, Washington, D. C. 20423.

(4) On Missouri Pacific Railroad Company and Southern Pacific Company by mailing a copy, in a duly addressed envelope with first class postage prepaid, to Charles L. Ford, Jr., General Attorney, Texas Railroad Association, P. O. Box 717, Austin, Texas 78767.

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